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File No. O Govt. of I. /49

Legal Deptt.

A **BRANCH**

Subject:— Opinions under the Government of India Act 1935

P-163/E

O. Govt. of India/49

File No.

Gen. 194 e.

46-A

C O N T E N T S

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Mjr/11/6
5 Cs.

MJR 19/6
19/6

Legal Department

Submitted

The D.M., Ahmednagar, wants to know whether in views of the detention of Mr. P.K. Bhapkar, M.L.A., and Mr. D.A. Deshmu...., M.L.A., the period of their absence from the Assembly due to detention is to be treated as period of absence for payment of their salaries and whether they cease to be entitled to draw their pay as M.L.A.s H.D. in its note points out at p. 3 ante that Mr. Dange, M.L.A. also has been in detention since the 2nd April 1948 and States that Govt. orders will be necessary on the general question of payment of Salaried to M.L.As during the period of their detention. B.L.D. to whom the papers were referred by H.D., points out that mere detention of a person is not by itself a disqualification for his continuing to be a member of the Assembly or the Council and that under rule 3 of the Bombay Legislature Members' Salaries and Allowances Rules, 1938, a member is not entitled to draw the salary payable to him for the period of his absence, only if he is absent without permission of the Chamber from all meetings of the ~~Assembly~~ Chamber for a period of 60 days or more as computed in the manner provided in section 68 of the Govt. of India Act, 1935. Since none of the ~~three~~ three members, the B.L.D. note further States, has so far completed 60 days of absence, they will have to be paid their salaries till they complete their 60 days of absence. If they remains absent for the said period they will not be entitled to

P.T.O.

any salary for the period of their absence and if they have already drawn their salaries for his period they will have to refund the same. The papers are being returned to H.D. through L.D. as desired by H.D. at p. 4 ante.

Sd/-
13/12/48

Mjr/7/6
4 Cs.

Legal Department

Seen and passed on to the Home Department.

Sd/-

o.c. 29/1

for Secretary to Government.

U.R. to H.D. (Spl.), No 69-Confl, dated the 31st January 1949

Mjr/7/

4 Co

Office of the R.L.A.

Question whether departmental enquiry is necessary before terminating services in the absence of a bond.

Civil Services (Classification, Control & Appeal) Rules.
Rules 55.

It appears from the report at page 149 ante that it would not be difficult to prove the execution of a services bond by Mr. Bawdekar; but that would not solve the present difficulty, for since the bond is not forthcoming as it must presumably have been lost, the contents thereof can be proved only by the person who has actually seen the original (see section 63(5 of the Indian Evidence Act); and the fact that other recruits taken in service executed bonds in the form at page 157(a) ante would not raise a presumption that Mr. Bawdekar must have also executed a bond in the same form. Consequently, unless there is evidence of some person who has actually seen the contents of the bond executed by Mr. Bawdekar, it would not be safe to assume that Mr. Bawdekar did execute a similar bond.

2. Even assuming that there is evidence to prove the execution of the bond by Mr . Bawdekar, it is clear from the contents of the bond at page 147(a) ante that although Government would be entitled to dispense with services of Mr. Bawdekar without notice and without any reasons being assigned, the addendum to the bond contemplates that oridinarily notice will be given te the extent possible. If such notice was not given on the ground that the action taken was ;punitive in character, such action would not strictly fall within the terms of the bond; and a departmental inquiry would be necessary before such action is taken (R.L.A's opinion No 494-Confl., dated 9-9-48).

3. In the circumstances, it would be advisable to hold a departmental inquiry.

Sd/- P.M.Lad
20/2
Remembrancer of Legal Affairs.

oc.

U.R. to C.S.D. through B. & S.D. 99-confl, dated the 10th Febfurary 1949

Mjr/7/6
4 Cs.

Office of the R.L.A.

The question for R.L.A's consideration is whether there is any legal objection to appointing Mr. Kunte or any other Parliamentary Secretary to the office of the Chairman of the Khar Lands Development Board.

2. The Khar Lands Development Board is a Board which the Provincial Government has to establish under section 3 of the Bombay Khar Lands Act, 1948. Under section 3 of that Act, the Board shall consist of a Chairman and certain number of members. The appointment of the Chairman is made by the Provincial Government under section 8 of the Act. Under section 9 the officers and servants appointed by the Provincial Governments are entitled to draw their pay and allowances from the Provincial revenues. Since the Chairman is one of the officers appointed by the Provincial Government under the Act, he would be entitled to draw his pay and allowances from the Provincial revenues and the fact that under section 10 of the Act the Board is required to re-imburse the Government for the cost incurred on account of the pay and allowances of the officers appointed under the Act will not make any difference. If a person holds any post to which he is appointed by the Government, and if he is paid out of the Provincial revenues, he can be considered to be holding an office of profit under the Crown in India within the meaning of section 69(1)(a) of the Government of India Act, 1935. It follows, therefore, that a Parliamentary Secretary appointed to be a Chairman of the Board willincur disqualification under section 69(1)(a) . The disqualification will be incurred even if the person appointed to be the Chairman of the Board does not accept any salary or allowances attached to the office. See Parliamentary Debates (1906) Chapter 101; and page 213 of May's Parliamentary Practice, 14th Edn.

3. If the intention is to appoint Mr. Kunte or any other Parliamentary Secretary as Chairman of the Board, it will be necessary to amend the Act so as to make the office of the

Chairman honorary so that no emoluments are attache
to the office. The alternative course would be
to amend the Bombay Legislature Members (Removal
of Disqualifications) Act, 1937, so as to include i
the Schedule to that Act the office of the Chairman
of the Board.

Sd/- P.M.Lad
14/2/

o.c

Remembrancer of Legal Affairs.

U.R. to R.D. No. 1769, dated the 14th February '49.

Mjr/7/6

A Ca.

Office of the R.L.A.

Since the States in question wil shortly form part of the Province under the Government of India (Amendment) Act, 1949, the question of constituting an electreal college for filling any vacancy in the seats allotted to them may not arise. The Act contemplates that the Governor.General will give directions as to representation in the Legislature; and if such representation is given, the question of filling the vacancy in the Constituent Assembly will have to be decided in accordance with the prodedure now applicable to the Legislature of the Province. Perhaps, this aspect of representation given to the States in the Provincial Legislature may be brought to the notice of the Central Government, so that they may, if necessary, incorporate suitable directions in the Order issue under sub-section (1) of section 290 A.

Sd/- P.M.Lad

e.c. 15/2/

Remembrancer of Legal Affairs.

U.R. to P. & S.D., No. 1819, dated the 15th February 1949.

Mjr/7/6

4 Cs.

Office of the R.L.A.

Clause (b) of sub-section (3) of section 266 of the Government of India Act, 1935, requires that subject to certain provisions the Public Service Commission shall be consulted on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers. Seniority is ordinarily the basic fact underlying promotion and, therefore, whatever affects seniority will inevitably affect promotion, and to that extent principles for the fixation of seniority are indistinguishable from principles to be followed in making promotions. The Public Service Commission seem to be right in their contention that clause (b) of sub-section (3) of section 266 is comprehensive enough to include the principles for the fixation of seniority of promoted officers.

Sd/- P.M.Lad
3/2

O.C.

Remembrancer of Legal Affairs.

U.R. to A and R.D.D., through the P and S.D., No. 1354
dated the 4th February 1949.

Ajr/7/6

4 Cs.

Office of the R.L.A.

here would be no objection to the appointment of Resident Magistrates as Civil Judges provided they possess the qualifications prescribed under sub-section(1) of section 255 and are selected as such by the Public Service Commission in accordance with the provisions of sub-section (2) of section 255

Sd/- P.M.Lad

O.C. 2/4

Remembrancer of Legal Affairs.

U.R. to H.D., No. 3621, dated the 4th April 1949.

MJr/7/6

A Cm.

Office of the R.L.A.

With respect, the view taken by the High Court is not correct. As held in R.L.A's opinion No. 7727 , dated the 13th August 1948, an Additional Assistant Secretary will be an Assistant Secretary within the meaning of rule 12 of the Rules of Buisness. The High Court has suggested that if the words "an Assistant Secretary" were used in rule 12, those words might include " and Additional Assistant Secretary "; but it is not clear how the substitution of the article "a" for the article "the " would make any difference. However, as the high Court has raised doubts, it would be desirable to amend the rule suitably.

Sd/- P.N.Lad
12/4

o.c.

Remembrancer of Legal Affairs.

U.R. to P. & S.D., No. 4032, dated the 13th April 1949.

Mjr/7/6

4 Cs.

Office of the R.L.A.

Two questions have been referred to the R.L.A. for opinion:-

(1) In case a member of the Bombay Public Service Commission is absent on leave, deputation or for any other cause for more than 30 days, can the Commission function legally with two members only, in spite of the fact that the corpus of the Commission prescribed by the Governor is three members;

(2) The Commission proposes to form Boards of two members for the purpose of holding interviews so that members may have some relief by rotation. The Chairman is not sure whether this is permissible within the terms of the Regulations appointing the Commission. The Regulation says that two members will form the quorum but this may not mean that two of the members can be asked to dispose of a particular case or a class of cases without the third having any responsibility for the decision. The Chairman, therefore, proposes to have the decision of a Board placed before the third member for his concurrence. He, however, feels that the best solution would be to amend the Regulation so as to permit the Chairman to distribute the work among Boards of any two members. G. & S.D. seeks advice as to whether this procedure would be valid under the Regulation.

2. Under section 265 of the Government of India Act 1935, the Chairman and other members of a Public Service Commission are to be appointed by the Governor of the Province. Sub-section (2) provides that in the case of a Provincial Commission the Governor of the Province may by regulations (a) determine the number of members of the Commission, their tenure of office and their conditions of service. Regulation 3 of the Regulations made under

this sub-section is to the effect that the Commission shall consist of a Chairman and two other members. It follows, therefore, that the Commission cannot normally function in the absence of any member or even the Chairman. It seems that in his opinion No. 179-Confl. dated the 7th December 1936, the R.L.A. had observed that section 265 does not mean that no proceedings of the Commission are valid unless the Chairman is present and the manner of discharge of the functions of the Commission relates to the internal procedure of the Commission and it would not be illegal to provide that the proceedings of the Commission shall not be invalidated by reason of any vacancy in the office of a member including a Chairman , The rules were apparently based upon this and the succeeding opinion No. 152 dated the 11th January 1937. It also seems that the amendment in the regulation relating to vacancy caused by leave was in consequence of the R.L.A's opinion No. 1012 dated 3-2-1942. The positio is, however, not free from doubt. Once a regulation is made under sub-section (2) of section 265 fixing the number of members of the Commission, it is doubtful whether it would be legally feasible to provide even by regulations, let alone rules which are admittedly non-statutory, that the Commission can function with less than the prescribed number. This difficulty has been experienced in other analogous enactments, and specific provision has therefore been made for fixing the quorum which can transact the business of the body. Thus, recently a new sub-section (2A) was inserted in section 4 of the Bombay Sales Tax Act, 1946, making it possible for two of the three members of the Sales Tax Tribunal to form the quorum for the disposal of its business. See also section 92 of the Bombay Industrial Relations Act, 1946, and clause 36 of the amended Letters Patent of the High Court. Provisions which determine the quorum for transacting

business or provide for the deputization by one member for the Chairman or which go still further and say that the proceedings of the Commission shall not be invalidated by reason of any vacancy in the office of the Chairman or a member cannot be said to be referable only to the manner of the discharge of its functions by the Commission and, therefore, to be described as a matter of mere internal procedure. They affect the very constitution of, and the exercise of the powers by, the Commission. The Act apparently intends that the Commission with its full complement of members should be responsible for the ultimate decision. It gives no power for framing even regulations for any of the purposes just described. These pruposes cannot, therefore, be achieved by non-statutory rules as has been done in the past. Even the regulation which says that a vacancy may not be filled if it is not exceeding 30 days would not seem to be strictly intra/ vires; for it is not relatable to any of the clauses of sub-section (2) of section 265 and there is no authority laying down that even during the short space the Commission can function with less than the prescribed number. That being the position, it would in no case be feasible for the Commission to function with two members only beyond the period of 30 days. The answer to the first question is, therefore, in the negative.

3. As regards the second ~~xxx~~ question, it would follow upon this view that the Chairman has rightly felt misgivings upon the subject and he is correct in his view that the ultimate decision must be taken by all the members. For the convenient despatch of business, however, it may be possible to provide in the ~~final~~ rules that certain subsidiary matters leading to the final decision may be attended to by one or more members of the Commission forming a Board or otherwise, so long as it is clearly understood that the final

decision would be taken by all the members and the Chairman.

4. Whether legal provision could be made whereby the final decision could be taken by a Board of ~~nine~~ some members of the Commission is a matter of policy. On the one hand, the intention of the Act has to be considered; and that intention seems to be that, whatever decision is to be taken by the Commission must be taken by the entire body which is the only method known of guaranteeing that all points of view have been considered in taking the decision. In matters concerning appointment, promotion and disciplinary action it is absolutely essential that more than one mind and preferably the minds of the entire number of the Commission should be brought to bear upon the question . On the other hand, the demands of administrative convenience have also to be considered if work is to be speedily disposed of. The best via media would, therefore, be as suggested by the Chairman to entrust the preliminaries of any decision to a Board and for the whole Commission to take the final decision in any particular matter. Even for achieving that limited objective, the safest course would then be to amend the Act so as to make it possible for the Governor to make regulations for all these pruposes and not to leave it to non-statutory rules.

Sd/- P.P.Lad

oc. 30/4

Remembrancer of Legal Affairs.

U.R. to P & S.D. No.4734, dated the 2nd May 1949.

Mjr/7/6

4 Cs.

Office of the R.L.A.

The pleader's notice of suit at p. 265 ante seems to have assumed on the basis of the statement in para. (ii) of the memo. at p.243 ante that the order terminating the services of Mr. Bavadekar still holds good. It appears necessary to clear that wrong impression. The pleader may be informed that Controller of Rationing's order No.C.R.IX/319 Confl.(at p.211 ante) has the effect of reinstating and suspending Mr. Bavadekar.

Mr. Bavadekar's objection to the holding of inquiry by the Controller of Rationing deserves consideration. It is a well established principle that it is not merely of some importance but is of fundamental importance that justice should not only be done but should mainfestly and undoubtedly be seem to be done. Following the principle it would not be advisable that the Controller of Rationing who once recorded a finding against Mr. Bavadekar should again be entrusted with the inquiry; particularly when he himself suggested that the inquiry should not be held by him or by his subordinates.

Sd/- P.M.Lad

o.c. 4/5

Remembrancer of Legal Affairs.

U.R. to P & S.D., No. 274-Confl , dated the 5th May 1949

Mjr/7/

4 Cs.

Legal Department

Attention of the Labour Department, is invited to the opinions forwarded with this Department U.R. No.6305, dated 6-7-1948, and U.R. No. 7889 dated 18-8-1948, in which the question of the appointment of a Minister on a statutory Housing the Corporation and the acceptance by a Minister of the Membership of the Indian Town and Country Planning Association has been considered. The observations in the extracts quoted in the said opinions regarding the Directorship of Companies apply to the Membership or Presidentship of a Co-operative Society. In view of the Position stated in the first opinion it would not be advisable for a Minister to accept the Office of a President or Vice-President of the Housing Soceity in question.

Sd/- J.R. Bhurandhar

o.c. 6-6

Additional Secretary to Government.

U.R. to Labour Department No.6318, dated the 7th June 1949.

Mjr/7/6

4 Cs.

Office of the R.L.A.

The proposal in this case is to take over the management of a concern, particularly of a textile mill, where the management of the mill persists in contravention of awards or agreements or making illegal changes or is generally so unresponsive in its attitude and neglectful of its duties as to provoke labour unrest, dislocation of work and loss of production. It is intended that powers for the purpose of assuming the control and management of mills and concerns should be taken by legislation. The question raised for the R.L.A's consideration is whether it is competent to the Province to enact such legislation.

2. The power of taking over management of undertakings was exercised during the war under Rule 81 of the Defence of India Rules and also in England under the Defense of the Realm Rules in force there. In Lahore Electric Supply Co. Ltd. v. the Province of Punjab (I1L.R. 24 Lahore 617 at p. 641) it was held that Rule 81 coupled with Rule 132 of the Defence of India Rules gave every conceivable power to Govt to control an undertaking so as to ensure not only the maintenance of supplies and services essential to the life of the community but also to safeguard against the danger of sabotage. A similar view was taken in England when the management of a colliery was taken over by Government (see also Point of Ayr Collieries, Ltd. v. Lloyd George, 1943 All England Law Reports, Vol. 2 p. 546). During the war specific provision was thus made for taking control of undertakings in the interest f public safety, the defence of the realm or the efficient prosecution of war or for the maintenance of supplies and services essential to the life of the community.

3. To-day any legislative proposal for this prupose can be related only to three entries in List II:

(1) Entry 1- Public Order

(2) Entry 2y. Production, supply and distribution of foods and development of industries, subject to the provisions in paragraph 31A in Dist III.

(2) Entry 32- Unemployment.

A reference in passing may be made to Entry 27 in List namely, Welfare of Labour. No doubt the powers of the Provincial Legislature in respect of an entry in List II are plenary and in exercising such powers the legislation can legitimately provide for matters which are incidental or ancillary to the main entry, provided the connection is demonstrable as approximate and not remote. A power to make laws "in respect of" (section 100 of the Govt. of India Act) any mat er is a power to make laws which in xxxx reality and substance are laws upon that matter. In pith and substance the law must relate to the matter contained in the entry. In this instance it would be difficult to establish a nexus between taking over the control and management of mills and the matters under any of the above entries. For the maintenance of public order it may sometimes become necessary to assume control and management of undertakings, but that can only be done in a law which deals primarily with public order and must neces arily be limited to contingencies of emergency where public safety is prejudiced. The entry "Unemployment" cannot be so liberally construed as to include in its scope legislation pertaining to the assumption of control and management of undertakings on the specious plea that, unless such control were assumed, unemployment may result. In considering the entry "Production, supply and distribution of goods and development of industries, subject to the provisions of paragraph 31A of List III" further difficulties arise which deserve notice. In the first place it is doubtful whether regulation and control of industries would be included in production, supply and distribution of goods. Entry 31A in List III which now deals with production, supply and distribution of products of industries (which is one variety of goods) would other wise have been sufficient to give the Central Govt. (and also the Provincial Govt.) power to regulate and control the industries in question. Nevertheless, entry No, 34 has been recently substituted in the Federal xxx Legislative List and

therein....

therein specific provision is made for regulation and control of industries making it clear thereby that entry No.31A did not embrace the regulation and control of industries referre to therein. On the same argument, it can be successfully contended that entry No29 in theProvincial List does not embrace the regulation and control of industries other than those covered by entry No.34 in the Federal Legislative List. Thespecific inclusion of regulation and control in respect f certain industries only would suggest that in respect of other industries left to the jurisdiction of the Province, it was not ~~xxxx~~ expected that the Province should have power of regulation and control. The Constitution Act must be read a a whole, and each power conferred upon the Central or Provincial Legislature must beread in the context of the words prescribing other legislative powers. It is noteworthy that, although the warwtime regulations in England and in India dealt with maintenance of supplies, nevertheles express power had to be given to assume control and management of undertakings. Moreover, it must be ascertained whether textiles in one of theindustries covered by entry No. 34 in the Federal Legislative List. The position to-day is that the Central Govt. has secured power to legislate in respect of production, supply and distribution of textile and the general policy laid down by the Central Govt. is ~~xxxxx~~ that the Provincial Govt. should not pass any legislation in respect of the production, supply and distribution of textiles, excepting in consultation with them .

4. For all these reasons I am of the opinion that it will not be feasible for the Provincial Legislature at this ~~xxx~~ stage to legislate for taking over the management and contr of such mills is recalcitrant and unresponsive in its attiude and neglectful of its duties so as to provoke labour unrest, disclocation of work and loss of production. Nor would it be feasible in my opinion to fallback on the entry "Welfare of Labour" in List III for that purpose, for the scope of that .....

entry cannot be expanded so as to cover the assumption of management of undertakings.

5. In my opinion, therefore, it would be dangerous to follow the precedent of the U.P. legislation. That legislation as finalised in U.P. Act XXVIII of 1947 defines a public utility service to mean any industry or undertaking which the provincial Govt. may, if satisfied that public emergency or public interests so require, by notification in the Official Gazette declare to be a public utility service for the purposes of this Act for such period as may be specified in the notification. I do not know to what entry the words "Public interest" are referable and I am certain that, if the textile industry or, what is still more astonishing, if an individual textile undertaking were decalred a public utility concern on the ground of public emergency or public interest, such declaration would be successfully challenged in the courts of law. Moreover, the operative section 3 of that Act again speaks of securing public convenience, which also is not referable to any entry in the list.

6. In judging the expediency of the legislation, due consideration must be given to the question whether Govt. would not be liable for the losses, if any, incurred in consequence of taking over control and management of the undertakings; for; the complaint can just be made that the proprietors or the shareholders owning the undertaking ought not to be put to a loss as a consequence of the management directed by Govt.

7. If the intention be merely to ensure that awards, etc., are respected by the mill management, that can be achieved by either making them executable as a decree or, if payment is to be made under the award by taking suitable power for making recovery of that money from the management.

e.c. Sd/- P.M.Lad 24/3
Remembrancer of Legal Affairs.

U.R. to Labour Deptt No. 37-65 dated 7th April 1949.
Mjr/7/6
4 Cs.

T e problem of second Chamber has been difficult of solution in the Political Science. The motives for creating or continuing Second Chambers have usually been mixed. As an abstract question reasons can be found in favour or against the creation of such Chambers. Some of them are collected in the Third Series of Constitutional preced nts published by the Secretariat of the Constituent Assembly (p. 146-147). T e main reasons in favour of Second Chambers re:- (1) that such chambers act as revising chambers or a check to prevent hasty legislation in popular or lower House, and (2) that they afford scope for representation of interests which could not be represented in the popular Chamber.

2. Second Chambers were introduced in India at the Centre under the Montague-Chalmsford Reforms while in some of the provinces they were introduced by the Government of India Act, 1935. In Bombay it was established under the Act of 1935. Without meaning any disrespect to anyone, the Bombay experience of a Second Chamber has been that it has proved neither an essential nor an obnoxious component of the Legislature. Abbe Saeyes, a politician of the French Revolution days has propounded a dilemma that, "It a Second Chamber dissents from the First, it is mischievous. If it agrees with it, it is superfluous." The failure of the experiment of Second Chambers in Bombay and other Provinces in India under the Act of 1935 has been mainly due to the Scheme of their composition: They were constituted on a high property or income franchise mainly with a view to provide representation to propertied classes. The nominations were intended to provide for representation to certain-

communities and interests. But as a revising Chambers, So far at least Bombay is concerned, the Upper House has had either no opportunity nor shown capacity to contribute its ~~xxxx~~ share.

3. All the same in the new Constitution in which the Lower House is to be elected on the basis of adult franchise purely on a terriotrial qualification, it will be worthwhile to continue the scheme of Second Chambers in some of the Provinces. The next decade will be a sort of a formative period particularly when the protions of Indian States which are not so advanced are being merged in the Provinces and there is likely to be a greater need to be felt for a second Chamber to act as a revising Chamber. Article 150 in the Draft Constitution which provides for Second Chambers is defective in many respects:-

(1) In the first place the Constitution should not make it obligatory on any province to have two Houses. It appears that the list of provinces which will have two Houses will be embodied in the Constitution. This will make it incumbent on a province like Bombay which will be presumably included in the list to have a Second Chamber. The Parliament should take power after consultation with the Province to establish a Second Chamber for the Province. It is understood that an amendment to this effect is being moved to the draft Constitution, Such a provision will enable the Province to abolish a Second Chamber whenever it thinks fit to do so.

(2) It is true that the composition of the Second Chamber should ~~not~~ be by direct election. Article 150 which is based on the Irish model

provides for indirect elections and nominations. In order to fulfil its proper prupose as a revising Chamber, the composition should be on a non-party basis. But although such may be an ide l scheme, it will lead to difficulties in aatual practice. The majority party in power either through the Lower House or by nominations must see that the Second Chamber is composed of persons who belong to it or have leanings towards its programme. Otherwise, in the words of Abb Saeyes, it will be a nuisance or mischmievous. At the sametime there ought to be sufficient scope for affording representation to best talents in several walks of life. Clause (2) of Article 150 provides that one-half of the total number of members shall be chosen from five ~~panesl~~ panels. The five panels selected are (1) Univer sity, (2) Literature, Art, ' Science, (3) Agri culture, Fisheries and Allied Subjects, (4) Engineering and Architecture and (5) Public Administration and Social services. One would add to these panels (i) Commerce, (ii) Industry (iii) Labour, (4) Legal and Medical profession. In view of modern tendencies it is very unlikely that these interests will be represented in the Lower House in territorial Constituencies. All the same it cannot be denied that these interests are component ~~parat~~ part of the social and economic life of the community.

3) Article 150 provides that the Legislative Council should consist of 25 per cent of the total number of the members of the Assembly. On the population basis the total number of members in the Bombay Legislature Assembly is likely to be about 400. The result will be that the total number of members in the Upper House will be about 100. For a revising Chamber this would perhaps be a very large number.

As a revising Chamber it should be a compact and not an unwiedly body

Sd/- J.R.Dhuurandhar

16-7-49

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4 Cs.

Dual Nationality for Indians in Malaya.

The Federal Agreement between the British and the Sultans to which a reference has been made by Mr. Ramani in his memorandum on clause 5 of the Draft Constitution of India, is not among the papers. According to Mr. Ramani the acquisition of Federal Citizenship of Malaya is consistent with the retention of his own nationality by the individual concerned-- in this case the Indian nationality. He points out a distinction between the position as it obtains in Ceylon and Burma and the position in Malaya in that whereas the two former countries require the renunciation of the parent nationality as the condition of the acquisition of their nationality, the Federal Malayan citizenship makes no such demand. However, Mr. Ramani admits that acquisition of the Federal Malayan Citizenship it is required that the person concerned should not only make a declaration of permanent residence in Malaya but agree to regard the Federation as his home and the object of his loyalty. The underlined words are only a paraphrase of the familiar legal expression "owing allegiance". The forms of oaths in the Draft Constitution, also speak of "faith and allegiance to the Constitution" It is, therefore, necessary that we should secure the actual provisions relating to Federal Malayan Citizenship, and if they contain a provision similar to that in the draft Constitution of India regarding loyalty, it would then follow that the person who ~~mark~~ acquires the Federal Malayan Citizenship, in that very process transfers his allegiance to the Constitution

of that country.

2. It is a matter of policy for the Government of India to decide whether the Indians who have emigrated from India and who have permanently settled in other parts of the world and have even professed faith and loyalty to the Constitutions of those parts should still be allowed to be called Indian Citizens carrying with it all the privileges under the Draft Constitution. There is no inherent legal objection to the conception of dual nationality, but whether we should adopt that conception is a matter of policy depending upon the internatic obligations which might arise such as being called upon to intervene in case of discrimination or the inconvenient situation which may arise in case the country which the emigrant has adopted finds itself at war with India. The Government of India must have taken some decision on the general principle as is apparent from the provisions made for Ceylon and Burma. It is a matter for their consideration whether any distinction should be made as regards Indians in Malaya.

3. Of the two amendments suggested by Mr. Ramani, the first on page 5 requiring 'the intention of transferring his allegation to that State' is impracticable. Animus revertendi for purposes of domicile is capable of proof from various circumstances such as acquiring home, property, etc ., in the country of adoption but the animus or intention of professing faith to

any Constitution is incapable of such a proof; for, it is open to a man to change his mind any moment he likes and swear faith to any Constitution he chooses.

4. The second amendment suggested on page 6 depends upon the exact provisions concerning the Federal Malayan Citizenship. The draft Constitution perhaps expects that a person who wants the citizenship of India should not owe allegiance to any other Constitution. If that be so, as said before, it is a matter of policy for the Government of India whether an exception should be made in the case of Indians in Malaya on the technical ground that although they may have to owe loyalty to their Constitution that does not preclude their owing allegiance to the Indian Constitution also.

Sd/- P.M.Lad
2/8/

o.c. Remembrancer of Legal Affairs.

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Office of the R.L.A.

There is no legal objection to empowering an officer by designation to sign orders or instructions of the Government of Bombay under rule 12 of the Rules of Buisness.

Sd/- P.M.Lad

O.C. 3/8

Remembrancer of Legal Affairs.

U.O. to r. & S.D. No. 8763, dated the 8th August 1949.

Mjr/7/6

4 Cs.

Office of the R.L.A.

'resentation if supplementary leamnds to 'egislature in :espect of ierged areas.

Sections 78 and 31 of the Govern. ment of India Act, 1935

As pointed out in the Finance Department note at pages 1-2 ante the R.L.A. on the last occasion advised that unless the areas in question have become part of the Province on or before the date of which the Budget is presented it would not be legally correct to put to the vote of the Legislature the expenditure which relates to the areas. Section 81 of the Government of India Act, 1935, which authorises the preparation of the supplementary statement has to be read with section 78 of the Act and the same principle which applies to the preparation of the Budget under that section will apply to the preparation of the supplementary statement under section 81 in regard to the expenditure incurred in respect of the areas. Accordingly, it will not be possible to include in the supplementary statement any expenditure incurred in respect of the areas in question before they became part of the Province on 1st August 1949. It will not be, therefore, feasible to obtain supplimentary grants for the whole of the current financial year as proposed by Finance Department in respect of the merged areas.

Sd/- P.M.Bad

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Remembrancer of Legal Affairs

e.c.

U.R. to F.D. No. 506-Confl, dated the 6th August 1949

Mjr/7/6

4 Cs.

Office of the R.L.A.

Whether Government can retrench the staff of High Court. Sections 241, 242 and 228 of the Govt. of India Act, 1935 and clause 8 of Letters Patent of 1865.

The questions referred to the R.L.A. for advice are:

(1) whether the Government has power to abolish, without the concurrence of the High Court posts of officers, including clerks, attached to the staff of the High Court, and

(2) whether Government can issue instructions to the Accountant General not to pass the pay bill of the staff if Government considers the number unnecessary.

2. The Subject is governed by clause 8 of the amended Letters Patent of 1865 and sections 241, 242 and 228 of the Government of India Act, 1935. Clause 8 of the Letters Patent originally read as follows:

> "And we do hereby authorise and empower the Chief Justice of the said High Court of Judicature at Bombay from time to time as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor in Council, to appoint so many ~~xxxxxxx~~ and such clerks and other ministerial officers as shall be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these our Letters Patent.
>
> And we do hereby ordain that every such appointment shall be forthwith submitted to ~~shall be either confirmed or disallowed by~~ the Governor in Council."

The last sub-paragraph was deleted by the Letters Patent dated the 11th March 1919. Before that deletion, there were two fetters upon the discretion of the Chief Justice (1) that the power to appoint was subject to any rules and restrictions which may be prescribed by the Governor in Council and (2) that every appointment had either to be confirmed or dis-allowed by the Governor in Council. Moreover, as the paragraph further on goes to say, the Governor in Council had to approve the salaries to be paid to the Holder of a particular office. It is thus obvious that the Chief Justice could exercise the power but subject to the

orders of the Governor in Council practically in all respects. That position was gradually changed. In 1919 the first fetter was removed, and it no longer became necessary for the Chief Justice to submit every appointment to the Governor in Council for confirmation or disallowance. After 1919 Government had still power not only of fixing the salary but of making rules and restrictions subject to which the Chief Justice could exercise the power to appoint. It is not known whether any such rules have been framed or restrictions imposed, but that expression is capable of the construction that the Governor in Council could, if he was so inclined, make rules or impose restrictions in relation to the strength of the staff by fixing the number or by prescribing that it shall not exceed a particular number.

3. It, however, appears that the Government of India Act, 1935, gave greater freedom to the Chief Justice in the exercise of his powers to appoint. Section 292 of the Government of India Act 1935, continued the Letters Patent but subject to the other provisions of that Act. As pointed out in H.L.A's recent opinion No. 7340 dated 1-7-49 by the other provisions, viz., of sections 241 and 242(4), the Chief Justice is put in the same position as the Governor in respect ~~xxxxxxxxxxx~~ of recruitment and making appointments ~~xxx~~ under section 241. Section 241, as adapted in the light of section 242(4), would read as follows:

> " Except as expressly provided by this Act, appointments to the staff attached to the High Court shall be made by the Chief Justice or such persons as ~~xx~~ he may direct."

Ordinarily the power to make the appointment would include the power to create the post. The two naturally go together. There is no provision in the Government of India Act, which specifically deals with the creation of posts by the Governor, which

again shows that section 241 as applied to the Gove... would also include the power of creating the posts, i.e., of determining the strength. The Government of India Act contains provisions regarding the strength of a service only in relation to the Services recruited by the Secretary of State. If the Chief Justice in relation to the staff attached to the High Court was to enjoy the same powers of appointment as the Governor in relation to the Civil Services and civil posts under the Crown, it would, therefore, follow that the Chief Juctice was given the power of creating the post and so determining the strength. Consgtitutionally that would have not led to any practical difficulty; for a specific power was given under sub-section (2) of section 228 to the Governor to decide what amount was to be include in respect of the expenses to be charged upon the revenue of the Province. That gave the Governor authority to veto any particular expenditure, and thus to control the strength of the staff. That this was the only method of checking the extravagant expenditure on the staff attached to the High Court was also accepted in the discussion between Lord Brabourne and Sir John Beaumont, of which a not has been left for future guidance at pages 105-123 of H.D. file 6481/3-IV,.

4. It is no doubt true that in R.L.A's opinion No. 6454 dated 23rd July 1941 it was held that despite the provision of the Government of India Act, 1935, Government still had the power under clause of the Letters Patent to determine the strength of the staff attached to the High Court. Curiously enough, having reached that view, the inconsistent position was also taken in that opinion that such power applied only to future recruitment and not to the existing establishment That distinction I find it very difficult to understand for, if under clause 8 of the Letters Patent

Government

can still claim the power of making rules and imposing restrictions on the number of the staff, there is no reason to think that the power can be used only for future recruitments and cannot govern the establishment already employed. Apart from that inconsistency, I am not disposed to agree with the opinion for the following reasons:

(1) As I have said before, the power to appoint given by section 241 of the Government of India Act is unqualified and includes the power to create the post as in the case of the Governor.

(2) The only restrictions now put upon the power of the Chief Justice are those contained in the proviso to section 242(2) and those restrictions do not include a restriction upon the power of determining the strength.

(3)The R.L.A's opinion No. 6454 dated the 23rd July 1941 makes a distinction between rules applicable to the determination of the strength and rules otherwise affecting the power to appoint. That distinction is not tenable. The expression "subject to any rules and restrictions which may be prescribed by the Governor in Council" governs the words "to appoint" and not the words " so many". The power to appoint so many and such clerks was sub ect to the rules and restrictions; but to-day that powers is subject only to the restrictions contained in the proviso to section 242(4).

(4) If the not referred to in paragraph 3 is a correct guide the point is really concluded.

5. It is no doubt true that a peculiar situation has been created by the recent adaptation of the Government of India Act by which sub-section (2) of section 226 was deleted. The result, therefore, is that there is no power now given to Government to control expenditure on the staff of the HighCourt or to curb

any possible extravagance in that manner by creation of unnecessary posts. That may be due to the desire to give greater independence to the Chief Justice who & the Governor General, who made the adaptation, perhaps trusted to be the sole judge of the necessity and the number of the staff and whom the Governor General Confidently expected not to abuse the discretion given to him in this behalf.

6. For these reasons I am of opinion that there is no power in Government to-day either to retrench the existing staff or to lay down any restrictions regarding the number of the staff attached to the High Court.

Sd/- P.M.Lad

o.c. 14/7/

Remembrancer of Legal Affairs.

U.R. to H.D. No. 7983 dated 15th July 1949

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Office of the R.L.A.

It appears that, ti. the Letters Patent of 11th March 1919, the pr ctice was that every appointment made by the Chief Justice was to be forthwith submitted to the approval of the Governor in Council and was to be either confirmed or disallowed by the Governor in Council. In the Letters Patent of the 11th March 1919 that provision was omitted. Under sub-section (4) of section 242, section 241 of the Government of India Act, 1935, in its application to appointments and to persons serving on the staff attached to a High Court shall have effect as if for the reference to the Governor in paragraph (b) of sub-section (1), in paragraph (b) of sub-section (2) and in sub-section section (5) of section 241, there were substituted a reference to the Chief Justice of a High Court. Therefore, the appointments to the staff attached to the High Court are to be made by the Chief Justice or such persons as he may direct.

Clause 8 of the Letters Patent of 1865 authorises and empowers the Chief Justice from time to time as occasion may require and subject to any rules and restrictions which may be prescribed by the Governor in Council to appint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice and the due execution of all powers and authorities granted and committed to the High Court. All officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall from time to time appoint for each office and place respectively and as the Governor in Council subject to the control of the

Governor General in Council shall approve of.

2. It seems, therefore, that originally all appointments were to be approved and confirmed or disallowed by Government and the salaries were also to be approved by Government; and that after 1919 the two restrictions upon the power of the Chief Justice to make appointments were (1) that his power to appoint was subject to rules and restrictions which may be prescribed by the Government and (2) the salaries were subject to the approval of the Government. Under section 292 of the Government of India Act, 1935, the Letters Patent would continue in force but subject to the provisions of the Act. Sections 241 and 242 of the Government of India Act, 1935, provide that appointments to the staff attached to a High Court shall be made by the Chief Justice and that the conditions of service of such staff shall be prescribed by rules to be made by the Chief Justice. This power is subject to two restrictions which are mentioned in the proviso to sub-section (4) of section 242. The first is that in the case of a High Court the Governor may require that in such cases as he may direct no person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Provincial Public Service Commission; and the second is that the rules made under sub-section (2) of section 241 by the Chief Justice shall, so far as they relate to salaries, allowances, leave or pension, require the approval of the Governor. This latter restriction corresponds to the second restriction in the Letters Patent cited above. The first restriction in the Letters Patent, viz., of the Chief Justice's power to appoint being subject to rules and restrictions made by the Governor in Council, is no

longer operative in regard to the power to appoint as distinguished from the powe to determine the strength of the staff (for which see R.L.A's opinion 6454 dated 23rd July 1941) . Its place is taken by the substantive provisions of section 241(1)(b) read with the first proviso to sub-section (4) of section 242. In other words, the operative law to-day regarding the power to appoint as distinguished from the power to determine the strength of the staffixxxxx is now contained in section 241(1)(b) read with section 242(4) and proviso (a) thereto. The only restriction upon the power of the Chief Justice to appoint persons to the staff attached to the High Court is that the Governor can require in such cases as he may direct that no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the Provincial Public Service Commission. The underlined words make it clear that the Government's power to direct that the Public Service Commission shall be consulted is confined only to case where a person who is not already on the establishment of the High Court is being appointed to a post on the staff of that Court, i.e., if the appointment is to be made from the ranks of outsiders. Whenever the appoi ment is to be made by promotion of any member of the staff attached to the High Court, Government cannot insist upon previous consultation with the Public Service Commission. The direction to consult the Public Service Commission can be given only in respect of the recruitment of outsiders, be it at the initial stage or be it at a higher stage. It would not thus be legally feasible to specify the offices or posts in respect of

reference must be made to the Public Service Commission before filling them. Government can, however, issue a general direction that no outsider shall be recruited on the staff attached to the High Court except after consultation with the Public Service Commission; and such direction would include the new appointments of clerks or even higher appointments if the Chief Justice proposes to fill them by recruiting outsiders.

3. It is necessary to add that Article 205 of the Draft Constitution as agreed to by the Constituent Assembly at the consideration Stage confirms the legal position as explained above.

sd/ P-M.Lad

o.c. 1/7

Remembrancer of Legal Affairs.

U.R. to H.P.D. No. 7340 dated the 1st July 1949.

Mjr/8/6

4 Cs.

Office of the R.L.A.

Section 256 of the Government of India Act, 1935, provides as follows:

> " 256 . No. recommendation shall be made for the grant of magisterial powers or of enhanced magisterial powers to or the withdrawal of any magisterial powers from any person save after consultation with the District Magistrate of the district in which he is working or with the chief Presidency Magistrate, as the case may be."

The underlined words show that the person to whom the magisterial powers are to be granted must be working in a district, i.e., he must already be in service. The section was intended to apply to conferment, enhancement or withdrawal of powers in the case of persons who were already in service in that particular district, the underlying idea being that the District Magistrate as the Executive Head of the Magis racy was in a position to know the merits. The section was not intended to apply to new appointments of Magistrates amde for the first time from the ranks of outsiders. There is justification for the policy of requiring prior consultation with the District Magistrate in the case of persons serving in his district, so that he should get an opportunity of expressing his views about their work and merit as known to him. The section, however, did not deprive the Provincial Government of its powers to mak appointments for the first time by making prior consultation necessary. This view finds support in the case of Biswanath Khemka v. King Emperor (1945 1 Federal Court Reports, vol 7 p 99 at pp 101-102) Zafrulla Khan J observed:

> " In our judgment, the section does not direct consultation with the Chief Presidency Magistrate when it is proposed to grant magisterial powers or enhanced magisterial powers to a person who is not at the time when the recommendation is made working as a Presidency or Additional Presidency Magistrate. The authority to be consulted in pursuance of the direction contained in the section is the District.

Magistrate of the district in which the pers. concerned is working at the time when the recommendation is made or the Chief Presidency Magistrate if the person concerned is at the time working under him."

I am, therefore, of opinion that no consultation is necessary in the case of displaced persons; because such persons can ot be said to have been working under any District Magistrate. Consultation is necessary in the case of Sub-Police Prosecutors; and in their cases the District Magistrates under whom they are working may be consulted.

R.L.A's opinion No. 9177 dated ~~1/1~~ 17th December 1946 should be treated modified to the extent shown above.

Sd/- P.M.Lad

o.c. 13/9/

Remembrancer of Legal Affairs.

U.R. to H.D. No. 10416, dated the 14th September 1949.

Mjr/8/6

4 Cs.

Section 290 A which was inserted in the Government of India Act, 1935, by the Government of India (Amendment) Act, 1949 provides that any area which formed part of an Indian State which is included in a Governor's Province shall be administered as if it formed part of the Province. Subsection (3) of that section provides that the Governor General may give supplemental and incidental directions for the purpose and that such directions may include directions as to representation in the Legislature. Accordingly the Governor General issued what is knows as the States Merger Order, 1949. Para II of the Order provides that notwithstanding anything contained in the Fifth Schedule to the Government of India Act, 1935, the total number of the seats in the Bombay Legislative Assembly shall be increased from 172 to 233. Schedule II of the Order shows the seats allocated to different merged States. Subpara (4) of para II of the Order provides that the Governor General shall by order in writing, nominate duly qualified persons to fill the additional seats and represent the people of the merged States or the group of merged States. In exercise of this power the Governor General has nominated additional members to the Legislative Assembly and the Legislative Council The policy of nomination resorted to for providing representation to the merged States' areas is the policy of the Governor General and not of the Provincial Government. It cannot

therefore, be discussed on the floor of this House and the cut motion in regard to it is o t of order. This will be in accordance with the decision of Hon'ble the Speaker in regard to an adjournment motion which was tabled on the same subject.

Sd/- J.R. Dhurándhar

o.c. 11/10

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4 Cs.

No. 8528

Legal Department,

Bombay Castle, 27th July 1949.

To

The Government Pleader,
High Court, Bombay,

Subject:- Criminal Appeal No. 255 of 1949

Sir,

I send herewith two copies of the note prepared in this Department in connection with the Criminal Appeal No. 255 of 1949 in which the validity of Bombay Act VI of1940 has been challenged. I am to request you to send one copy of the note for the use of the Advocate General, who as already requested in para 1 of this Department letter No. 8163 dated 19th July 1949, should be instructed to appear in the case which has been fixed for final hearing on 2nd August 1949.

The papers sent with your letter No. 3541 dated 22nd July 1949 are returned herewith.

Yours faithfully,

Sd/-

o.c. 27/5

For Additional Secretary to Government

Mjr/9/6
4 Cs.

Legal Department.

The accused Miss Kishori Setty has been convicted by the Presidency Magistrate in this case for possxng essing foreign liquor in excess of the quantity allowed by law. She has appealed to the High Court against her conviction. One of the grounds taken in appeal is that Bombay Act VI of 1940 which has deleted the proviso to sub-section (1)of section 14(B) of the Bombay Abkari Act, 1878 , is ultra vires of the Legislature. The Provincial Government is vitally concerned with this challenge to the validity of the Bombay Act VI of 1940.

Section 14(B) of the Bombay Act as it originally stood ran as follows:-

" Sec.14(B)(1) No person not being a licensed manufacturer or vendor of any intoxicant or hemp and no licensed vendor except as authorised by his licence shall have in his possession any quantity of any intoxicant or hemp in excess of such limit as the Provincial Government under section 17 may direct to be the limit of retail sale, except under a permit from the Collector:

Provided that nothing in sub-section (1) shall extend to any foreign liquor, other than denatured spirit, in the possession of any common carrier or warehouseman as such, or purchased by any person for his bona-fide private consumption and not for sale.

(2) Notwithstanding anything contained in sub-section (1) the Provincial Government may by notification in the Official Gazette prohibit the possession by any person or class of persons, either throughout the whole Presidency or in the local area of any intoxicant as it may prescribe."

The notification under Section 17 declaring that the limit of sale by retail has been issued

Provincial Government vide Notification No. 17(1)-47/39 dated 31st March 1948).

When the Congress Party assumed office in 1937, it declared that its excise policy was of total prohibition. With that purpose in view several orders or notifications were issued banning the possession of intoxicants or permitting them to the extent of certain quantities in various areas of the Province which were declared to be dry areas. One of the notifications No. 982/24(b) dated the 11th July 1938 which applied to the Ahmedabad City and other areas in the Ahmedabad District was in the following terms:-

"In exercise of the powers conferred by sub-section (2) of section14 of the Bombay Abkari Act 1878, the Government of Bomba, is pleased to prohibit with effect from the mid-night of 20th July 1938, the possession by any per-son without a pass, permit or licence of any quan-tity of any intoxicant (other than those specified in the Schedulei.e. certain medical preparation) in the areas noted in the margin (i.e. referred to above)."

In regard to the City of Bombay a notification in similar terms was issued. It was No. 374/39(c) dated the 17th July 1939. Both these notifications were the subject matter of litigations both in Ahmedabad as well as in Bombay. They were attacked as being ultra vires and illegal mainly on two grounds:-

(1) It was contended that the Bombay Abkari Act was only a revenue or licensing Act, It recognized and presupposed a continued existence of manufacture, sale and possession of liquor

and it was to regulate these that the variou provisions of the Act were framed and could be used. It was therefore urged that any action taken under the provisions of the Act which prohibited altogether the manufacture, sale and possession of liquor was illegal and without jurisdiction.

(2) Sub-section (2) of section 14 of the Bombay Abkari Act, which provided that Government by notification could prohibit the possession of any intoxicant by any person or a class of persons would not be competent to prohibit such possession by the public generally.

2. These cases came on for hearing in 1940 after the Congress Government went out of Office. The Sessions Judge in Ahmedabad (Mr. Rajadhyaksha now a Judge of the High Court) over-ruled both the contentions and held that the notification was legal. In the City of Bombay different Presidency Magistrates took different views. Some held that the notification was legal, while the others held that it was ultra vires. One of the latter remarked "I hold that the notification and rules made by the Provincial Government in connection with Prohibition as a measure of social reform are, whether they refer to foreign liquor, today or any other intoxicant referred to in the Abkari Act, lock, stock and barrel ultra vires."

3. The appeals against the decisions were heard by a Bench of the High Court consisting of five Judges and the judgment of the High Court is reported in Chunubhai Lalbhai Vs. Emperor I.L.R. (1940) Bom 567. The High Court held that both the notifications mentioned in para 1 above were illegal. The decision of the High Court was-

Abkari Act, 1878, was

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[illegible] necessary to secure Abkari revenue, though some of the sections for example section 17-A and sections 35(2)(g) and (h) show that the legislature intended also to confer power to control the trade in drink and drugs and to abaviate abuses which might arise from such trades. Nowhere in the Act is there anything to suggest that the Legislature contemplated the introduction of the total prohibition of intoxicants as a measure of social reform, and such introduction would virtually make an end of the pruposes of the Act."

In regard to the second point the High Court held that the natural meaning of the expression "any person or class of persons" in section 14B.2) of the Abkari Act, is a person designated by name or description or a class of persons designated. On the very day on which this decision was pronounced, the then Government in power acting under section 93 of the Government of India Act, issued Bombay Act VI of 1940 by which the preamble to the Bombay Abkari Act was amended by the insertion of the words "And whereas in order to promote, enforce and carry out into effect the policy of Prohibition, it is necessary to prohibit the import, export, transport, manufacture, sale and possession of liquor and of intoxicating drugs." In sub-section (2) of section 14B, after the words " any person or class of persons", the words "any individual or class or body of individuals or the public generally" were inserted Another provision which was introduced in the Act was to give retrospective operation to the amendments for the purpose of validating notifications which were held ultra vires by the [illegible] High Court. For making these alterations in the Bombay Abkari Act, 1878, reliance was placed on Entry No. 31 in List II of the Seventh Schedule to the Government of India Act

1935 which runs as follows:-

"31.- Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs."

The validity of this Act was again challenged. On a reference to the High Court by one of the Presidency Magistrates in Bombay, the High Court again held that the Act could not validate or revise the notification held by it to be ultra vires in the previous decision. The High Court in the case in Emperor vs. Dantes I.L.R. (1940) Bom. 777 came to the conclusion that the power of the Provincial Government to legislate as to the possession of intoxicatant was qualified and not absolute. It was subject to the right of the Central Government. The High Court observed that the absolute prohibition against possession went much further than mere incidentally diminishing the regenues of the Central Government. It destroyed indirectly no doubt, but none the less effectively the right to import or export intoxicants across the customs frontier. As this decision raised a question affecting constitution under the Government of India Act, 1935 relating to the relative powers of the Centre and the Province, an application was made to the High Court for leave to appeal to the Federal Court. The High Court refused leave on the ground that the case did not involve the question of law under the Government of India Act 1935.

The Government then modified the Prohibition policy intiated by the Congress Government and the High Court's decisions remained where they

wealo. In the meanwhile the other Provinces had initiated Prohibition. Some like Madras, Orissa and C.P. passed separate Prohib tion Acts, while others tried to enforce the policy under the provisions of their E xcise Acts which were similar in lines as out Abkari ct. Bihar however was one of the Provinces which followed the same method ~~xxxxxx~~ as was followed in Bombay. It first tried to enforce its policy of Prohibition through its Excise Act of 1915. The Patna High Court followed the Bombay decision and held that the Excise Act could not be used for this purpose and that the Bihar Government's notification was illegal. The Bihar Government passed a Governor's Act on the same lines as Bombay Act V. of 1940, but issued a fresh notification banning possession. The Act was challenged and the Patna High Court again took the same view as the Bombay High Court. But the matter was taken to the Federal Court. The Federal Court set aside the judgment of the Patna High Court (Bhola Prasad vs. King Emp. 1942 - F.C.R. 171. Sir Maurice Gwyer in delivering the judgment held that the Bihar Excise amendment Act, 1940 was perfectly within the competence of the Governor as exercising the powers of the Provincial Legislature, He observed that Entry No. 31 in List II in the Seventh Schedule to the Government of India Act which relates to 'intoxicating liquors and narcotic drugs' could not well be expressed wider terms and would in our opinion, unless the meaning of the words used is restricted or controlled by the context or by other provisions in this Act, undoubtedly include the power to prohibit intoxicating liquors throughout the Province or any specified part of the province . . . It is difficult to conceive of legislation with respect to intoxicating liquors and narcotic drugs which did not deal in some way or other with

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their production, manufacture, possession, transport, purchase or sale, and these words seem apt to cover the whole field of possible legislation on the subject." Referring to the Bihar Excise Act of 1915 the Federal Court observed " it is, however, by no means clear to us that the Legislature of Bihar and Orissa (as the Province then was) in 1915 never had in mind the possible use of the Bihar and Orissa Excise Act, 1915 for the promotion of a policy of total or partial Prohibition. The Bihar Act of 1915 was consolidating and amending Act. (So also was our Bombay Act). The Federal Court then referred to section 14B (2) of the Bombay Act, (Notifications issued under which were held illegal) as illustrating that policy. The Court further remarked "There is no reason in theory or principle why an excise Act should not have a double object, the benefit of the revenue and the improvement of public health or morals by a greater control of the liquor trade. The Licensing Acts in England are an example."

This judgment of the Federal Court virtually over-rules the view of the Bombay High Court on both the points viz.(1) that an Excise or Abkari Act cannot be used to enforce the policy of prohibition, and (2) under Entry No. 31 in List II in the Seventh Schedule to the Government of India Act, the Provincial Legislature has no power to prohibit the total possession, sale etc., of intoxicants. Section 212 of the Government of India Act, 1935 i.e. the present Constitution Act provides that the law declared by the Federal Court shall, so far as applicable, be recognized as binding and shall be followed by all Courts in a Governor's Province. The law declared.

by the Federal Court in Bhola Prasad's case is therefore binding on all Courts in our Province and has to be followed.

Following this interpretation of Law as stated in Bhola Prasad's case, the Bombay Legislature amended the Bombay Abkari Act, 1878 by which the amendments which were set to be carried out by the Bombay Act VI of 1940 held as being ultra vires were inserted in the Act of 1878. The preamble was amended by the insertion of the words stating that the object of the Act was to promote, enforce and carry into effect the policy of prohibition. Section 148 (1) was amended by the deletion of the proviso thereto and sub-section 2 of section 14 was also similarly amended.

It is likely that in the present case the arguments urged in Dante's case are likely to ~~xx~~ be raised again, and therefore, it is necessary to go more closely into those arguments and meet them by the decided cases. In Dante's case, the case of Attorney General of Manitoba Vs. Manitoba Licence Holders' Association 1902(A.C.) 73, was considered as not applying to legislation absolutely prohibiting possession of foreign liquor. In the Privy Council case referred to the Legislature of the Province of Manitoba had passed an Act known as the Liquor Act. The Act was passed for the main object of suppressing the liquor traffic in Manitoba by prohibiting provincial transactions in liquor, purported to prohibit all use in Manitoba of spirituous fermented malt and all intoxicating liquors as beverages or otherwise than for sacramental, medicinal or scientific purposes, and they inc ude divers prohibitions and restrictions affecting the importation, exportation, manufacture, keeping , sale, purchase, and the use of such

liquors. One of the arguments advanced in that case is that the Act was in conflict with the Dominion powers among which are concerned the regulations of trade and commerce and the raising of money by indirect taxation. The Dominion was largely dependent on the Excise and Customs revenue from the manufa ture and importation of liquor and the Act in question t/renched on that source of revenue. This argument found support in the Court of Kings Bench and the Act was declared un-constitutional, by that Bench, In the Appeal the Privy Council, however, held that the Legislature of Manitoba did not transgress the limits of its jurisdiction in passing the Act. They held that unless the Act becomes a dead letter it must interfere with the revenue of the Dominion, with licenced trades in the Province of Manitoba, and indirectly at least with the business operations beyond the limits of the Province. The Act was held constitutional not because it only diminished the revenues of the Dominion as suggested in the Judgment of Beaumont C.J. in Dante's case. It was admitted in that case that however carefully legislation may be framed it may or must interfere with the sources of the Dominion revenue. The Manitoba Act even if it had diminished the Dominion revenues compeletely and absolutely, the Act would still have been held as constitutional.

On effect of the Bombay Act VI of 1949 will be to enable the Government to issue notifications absolutely prohib.ting the possession even of freign liquor. The question would be whether such an enactment is within the competence of the Provincial Legislature. In considering the question whether any enactment is within the competence of the Legisture, the test laid

down by the Privy Council in the recent case of Prafulla Kumar Mukherjee Vs. Bank of Commerce Ltd., Khulna, in whether the pith and the substance of the legislation falls within its authorised field. In the Indian Constitution there are three Lists distributing the powers of the various Legislatures. The Privy Council has clearly laid down that subjects under the three Lists are bound to over.lap and where they do, the question must be asked what in pith and substance is the effect of an enactment of which a complaint is made and what is its true nature and character. In that case Lord Porter who delivered the judgment observes:- 49. Bom. L.R. 568

" No doubt where they (Lists) come in conflict List I has priority over List II and List III has priority over List II "but the question still remains priority/in what respects? Does the priority of the Federal legislature prevent the Provincial legislature from dealing with any matter which may incidentally affect any item in its list or in each case has one to consider what the substance of an Act is, and whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordship's opinion the latter is the true view."

The above observations give a complete answer to Beaumont C.J. 's statement in Dante's case that the power of the Provincial Government to legislate as to possession is subject to the rights of the Central Government. Once it is admitted that the Provincial Legislature has the power to deal with any matter, it is immaterial that it incidentally affects any matter with which the Federal Legislature is concerned. In such a case the Provincial Legislature is not subject to any right of the Central Government. The decision of the Privy Council in the Bank of Commerce case referred to above is supported by the well.known

case of Gallagher Vs. Lynn 1937, (A.C.) 863. Lord Atkin in delivering judgement in that case has observed: "It is well established that you are to look at the true nature and character of the legislation" : the pith and substance of the legislation. If, on the statute as a whole, you find that the substance of the legislationis within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field." The doctrine of pith and substance was also adopted by the Bombay High Court in the recent case of Mulchand Vs. Raman in which the question of the validity of the Bombay City Civil Courts Act was raised. In that case it was held that the mere fact that there is a tress- pass of Provincial Legislature upon the Federal field does not make the Provincial Legislation ulta-rires, provided in substance it is dealing with the Provincial subject.

51, Bom. L.R.66.

The above authorities make it clear that any Provincial Legislation falling within Entry 31 of the Provincial Legislative List will not be ultra vires merely because it affects the import or export across the customs frontiers as defined by the Dominion Government, a matter falling within the Federal Legislative List. So long as the Provincial Legislature does not legislate in the Federal field or any of the provisions enacted by it do not advance into the federal territory, as to show that their true nature is not concerned with provincial matters, the Provincial Legislation will be perfectly valid and can not be attacked on the ground the it has incidentally affected any items in the Federal field.

The Bombay Act VI of 1949 which deletes the proviso to sub-section (1) ~~thereof~~ of Section 14B of the

Bombay Abkari Act is a peffectly valid piece of legislation. The Pith and substance of the enactment falls under Entry 31 of the Provincial Legislative List. It is true that it may affect the import and export across the customs fpointiers but as the pith and substances of the enactment is a Provincial subject and not a Federal one it cannot be considered ultra vires of the Provincial Legislature.

It may be noted in this connection that when the Bombay Abkari Act, 1878, was amended by the Parliament by the Adaptation Order of Laws, 1937, a clear distinction was made btween the powers of Centre and the Province contained in the provisions of the Act. In section 3(10) the definition of import and export was amended to make it clear that the powers of the Province regarding import and export would not include import or export across the Customs frontier. The provisions like section 9(2) and proviso (ii) to section 12 which related to the Centre's powers and which affected import into and export out of British India were left untouched. The provision in section 14B as xxkixg nothing to do with import into or export out of the British India. It was perfectly open to the Provincial Legislature to delete it.

Sd/- J.R. Dhurandhar

O.C.

Additional Secretary Government.

Rjr/9/6

4 Co.

Supplementary note.

(1) The scope of entry No. 31 in List II of the Seventh Schedule to the Government of India Act is clearly expalined by the Federal Court in Bhola Prasad (1942) F.C.R. 17 case- "It undoubtedly includes power to prohibit intoxicating liquors throughout the Province or by any specified part." No destinction is made in their observation between liquors manufactured in the Province or imported across the Customs Frontier. The words "manufacture, possession etc. in the Entry'are stated to be explanatory. The words cover the whole field of possible legislation.

This interpretetion is binding on the High Court under section 212 of the Government of India Act and over-rules any opinion or decision to the contrary.

The next point decided by the Federal Court in the Bhola Prasad's case is that the Abkari Act is not truly a revenue act. It can be used for the purpose of controlling or prohibiting the use of intoxicants.

(2) if that so, any provision incidentally affecting import or export is permitted

Prafulla Kumar vs. Adv. General of Bengal 74 I.A. 23

Gallagher vs. Lyun (1937) A.C. 863.

where Milk and Milk products Act of Northern Ireland was held valid, not withstanding it affected trade with any place outside Ireland

See also Shannon vs. London mainland Dairy Products (1938 A.C. 708.

This was the view held in the similar case by the Privy Council in M.C. Manitoba vs. Manitoba Licence Holders Association (1902) A.C. 63. The P.T.O.

...son drawn by the Bombay High Court between this case and the Abkari Act is wrong.

Other cases in Canada in which the Liquor Licensing Acts which were local measure were upheld are

(1) A.G. for Ontario vs. A.G. for Canada, (1896) A.C. 348

(2) Lodge vs. Queen 9app. Cas. 117

(3) Canadian Pacific Wine Co. vs. Tuley (1921) 2 A.C. 417

(4) Brewers and Malt Stores Association of Ontario
c.s.
A.G. for Canada (1897) A.C. 231.

(3) In the present case the charge against the accused is under section 14B (1). It relates to punishment. It has nothing to do with Import or Export outside British India. Section 11 and 12 deal with such import and export.

See the definition of import and export in sec. 3(10) of the Bombay Abakri Act. Besides see the definition of foreign liquor in sec. 3(8). It is not restricted to liquor manfactured outside India. It is not alleged by the defence that the liquor which was the subject matterof the charge was imported liquor . Merely beca se it was foreign liquor, it does not nec: ssar ly follow that it was imported.

(4) The accused is not the importerof Foreign liquor.

No restriction has been put on possession incidental to import.

Trade and Import licences are granted.

(5) Entry No. 19 in List I is the General Entry . It does not specifically refer to intoxicants. When the Legislature wanted to deal specifically with such intoxicants,it has done so expressly, see Entry No. 31, opinion in the same list.

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Such a general entry cannot be used to destroy full and plenary powers of the provision under entry No. 31 in List II.

Similar entries as such entry No 3D adulteration of Food stuffs would became nullified. In connection with t is attention is invited to Secs. 4,5 of the Opium Act, 1878 and the provision of section 8 of the Dangerous Drugs Act , 1930, Both the provisions relate to dangerous drugs or intoxicants. The power to prohibit permission is entirely left to the Provincial Government by the order in Council made by the Parliament at the time of the adaptation of the Acts in 1937.

See A.G. for Ontario vs. Reciprocal Insurers (1924) A.C.328

The Province can legislate for what has become the part of the property in the Province.

Workmen's Compensation
vs.
Canadian Pacific Railway (1920) A.C. 184.

A.G. Canada vs. A.G. Ontario (1898) A.C. 700.

Craft vs. Danfy (1933) A.C. 156.

(6) Even assuming that prohibitions against possessionof intoxicants affects the import of foreign intoxicants, in one Province, the entry does not become a nullity.
Such intoxicants can be transported to other Provinces or centrally administered areas.

The entry can still be used for the import of other articles in respect of which the Provinces have not such power as under ~~entry Provinces have not such power as under~~ entry No. 31 in List II.

(7) The canons of Construction of different entries in the Seventh Schedule of the Govt. of India Act are set out in C.P. Petrol Tax Cases (1938) 2 F.L.J. 6

P.T.O.

(8) Madras, C.P., Bihar ~~and~~ and Orissa have introduced prohibition. Their Prohibition Acts prohibit possession of liquor. See Madras Prohibition ~~Act~~/ Act, 1937, C.P. and Berar Prohibition Act, 1938, Bihar Prohibition Act, 1938 and Orissa Prohibition Act, 1939.

(9) It ~~is~~ was proposed to pass legislation for prohibiting the import and export of intoxicants within the meaning of the Bombay Abkari Act, 1878 and also for prohibiting the transport of intoxicants from the customs frontier which may be incidental to import across the customs frontier. The Advocate General in his opinion No. 36 of 1948 stated that the proposed legislation would not be invalid. Possession stands on the same footing as intra Provincial transport.

Ajr/9/6

4 Cs.

No. 4094

From

THE GOVERNMENT PLEADER, HIGH COURT,
BOMBAY;

To

The Remembrancer of Legal Affairs, Bombay

Bombay, 24-8-1949

Sir,

Referring to Your letter No.
dated 27.7.1949 , I have the honour to inform you that

Criminal Appeal No. 255/1949 Miss Kishori Shetty. V/S R E X.	the Case noted in the margin was heard by the High Court on

11.8.1949 When the following orders was passed:-

"The Court confirms the order of conviction and sentence passed on the accused by the Presy. Magt. 5th Court, Dadar, Bombay and dismisses the appeal. The accused to surrender to her bail bond.- Certificate granted."

Your most obedient servant,

Sd/-

Government Pleader, High Court.

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Office of the R.L.A.

After their absorption under G.R.H.D. No. 2010/5, dated 7th May 1948, Section writers have now become regular Government servants. The power to make rules in regarding to them vests in the Governor of the Province, and unless it is delegated to the High Court, the High Court would not be competent to make such rules: section 241(1)(b)cf the Government of India Act, 1935; compare also the Bombay Civil Services Classification and Recruitment Rules. Section 41A of the and Recruitment Rules. Section 41A of the Bombay Civil Courts Act, 1869, under which the High Court purports to make the rules has no application, as it applies only to petition-writers who are quite distinct from section writers now absorbed in Government service.

Sd/- P.M.Lad

O.C. 28/10

Remembrancer of Legal Affairs.

U.E. to H.D. No. 12132, dated the 29th October 1949.

Mjr/9/6

4 Cs.

I have nothing further to add to the reasoning given in my opinion No. 2245 dated the 5th March 1948. The Acting Advocate General. Mr, Amin- also acknowledged that an inconsistent position had resulted by reason of the adaptation ~~of India Act 1935 xxxx

Office of the R.L.A.

Section 3 of the Influx from Pakistan (Control) Act, 1949, which is an enactment passed by the Dominion Legislature , prohibits any person from entering India from any place in Pakistan unless he fulfils certain conditions. Section 5 of the Act ~~fulfils certain~~ provides for punishment of persons who enter India in contravention of the provisions of section 3, or who having entered India contravene the provisions of any rule made under section 4, or who commit a breach of any of the conditions of their permits. Section 6 which follows next empowers any officer of police not below the rank of sub-Inspector, any officer of the Customs Department of the Central Government or any other officer of Government empowered by a general or special order of the Central Government to arrest without warrant any person who has committed or against whom a reasonable suspicion exists that he has committed an offence under the Act. It appears that it will be necessary to entertain extra police staff for the purpose of exercising these powers to arrest and thus enforcing the Act. The question raised for the R.L.A's consideration is whether the extra cost incurred by the Province on account of entertaining such staff should be borne by the Central Government or by the Provincial Government.

2. The question can be answered only on the basis of section 124(2) and (4) of the Government of India Act , 1935. Sub-section (2) of section 124 provides that an Act of the Dominion Legislature may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has no power to make laws, confer powers and impose duties upon a Province or officers and authorities thereof. Sub-section (4) goes on to say that where by virtue of this section powers and duties have been conferred or imposed upon a Province or officers or authorities thereof, there shall be paid the Dominion to the Province such sums as may be agreed or in default of agreement ....

of agreement as may be determined by an arbitrator appointed by the Chief Justice of India in respect of any extra costs of administration incurred by the Province in connection with the exercise of those powers and duties. The question, therefore, resolves itself into the narrow inquiry as to whether the Influx from Pakistan (Control) Act, 1949, imposes duties upon the officers and authorities of the Province notwithstanding that the Act relates to a matter with respect to which the Provincial Legislature has no power to make law. In my opinion the underlined words furnish the key to the intention of section 124. That intention is that where the Dominion Legislature makes a law in relation to a matter in respect of which the Provincial Legislature has no power to make laws, then alone can the expense be demanded from the Central Government if the conferment of powers etc. under that Act leads to extra costs of administration. Where the Dominion Legislature makes law in relation to a matter which falls within the Concurrent List or which, though it may fall within the Provincial List, has been entrusted to the Centre under section 103 or comes within the scope of the Dominion Legislature under section 102, the Province cannot claim the extra costs for the simple reason that the costs pertain to a matter which falls within their own jurisdiction and for the administration of which they are either primarily or equally responsible. The principle underlying the allocation of costs is not based upon the agency which makes the law but upon the subject matter in respect of which the law is made . If the subject matter is entirely outside the ambit of the Province and the law relating to it casts any duties upon the Province or the authorities which lead to extra expenditure, then, naturally the Province is entitled to claim reimbursemen for, it is carrying out a function which the Constitutio

Act expects the Central Government to .
R.L.A's opinion No. 5360, dated 1st Jul 194.
within this latter class inasmuch as it related t.
administration of income-tax by the Collectors in a Province, a subject matter in relation to which the Province had no power whatsoever. In the present case the duty to arrest without warrant is referable to the subject matter of criminal procedure which falls within the Concurrent List, and any extra costs which may be incurred in exercise of that duty cannot, therefore, be debitable to the Central Government upon the principle explained above.

Sd/- P.M.Lad
o.c. 11/11

Remembrancer of Legal Affairs.

U.R. to P.O., P & S.D. No. 12715 dated the
11th November 1949.

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With reference to R.L.A's opinion No 12715, dated the 1th November 1949 at page 69 ante, it is pointed out by he Department that apart from the power of arrest, the ollowing other duties are placed under the Influx from akistan (Control) Act, 1949, on the Provincial Government nd its officer, namely:-

(1) Receipt from the High Commissioner of all temporary ermits for entry into India and keeping a watch on such ermits to ensure that the permit holders do not overstay.

(2) Temporary extension of temporary permits.

(3) Enquiries in respect of applications for permanent eturn to India made to the High Commissioner in Karachi.

(4) Keeping watch to prevent the illegal entry of people rom Pakistan.

(5) Removal to Pakistan of those illegally remaining in he Province.

In the light of the forgoing, the R,L.A. is requested to dvise what definite line of action should be taken by the epartment in this matter.

2. As stated in the R.L.A's opinion the principle under- ying the allocation of costs is not based upon the gency hich makes the law but upon the subject matter in respect of hich the law is made. Bearing in mind this princi ple it ppears that the duties cast on the officers of the Provincial overnment under items (1) and (4) above are relatable to ntry 3 in List II in the Seventh Schedule to the Government f India Act, 1935, for which no costs can be claimed. The orkd of receiving temporary permits from the High Commissioner s ancillary and intended to facilitate the work of keeping watch on the permit holders.

3. As regards the duties cast under items (2) and (3) a laim could be made against the Government of India for any xtra costs of administration incurred by the Province in onnection with the exercise of these duties.

4. As regards the duty cast under item (5) also a claim ould be made against the Government of India for extra.

costs as the removal would be made under the orders of the Central Government under section 7 of the Influx from Pakistan (Conyrol) Act, 1949 (XXII of 1949).

5- It is for the Department to consider whether it is worthwhile to press for the claim for the duties discussed in paragraph 3 and 4 above, when no claim can be made for the principal work of enforcing the Act viz. bringing offenders to book.

Sd/- P.N.Lad
23/11

o.c.

Remembrancer of Legal Affair

U.R. to P.O., P. & S.D., No. 13439, dated the 24th November 1949.

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Office of the R.L.A.

Presumably R.L.A's opinion which F.D. has in view is No. 5040, dated 7th September 1936. In that opinion it has been held that in the absence of any provision being made, it will be sufficent compliance with the provisions of section 80(2) if a copy of an authenticated Schedule is sent to every member and also laid on the table as soon as may be preferably before the end of the session at which the budget is presented and discussed. The statement made in the F.D. note that the R.L.A. advised on the previous occasion that the Schedule should be placed as soon as possible after the grants are voted and in any case not later than the end of the session in which the, are voted is not correct.

2. Sub-section (2) of section 80 of the Government of India Act, 1935, provides that the Schedule referred to in sub-section (1) authenticated by the Governor shall be laid before the Assembly but shall not be open to discussion or vote in the legislature. In virtue of the provisions of section 81 of the Act, the provisions of sub-section (2) of section 80 shall apply to the laying of the Schedule of supplementary expenditure. Sub-section (2) of section 30 does not require that the authenticated Schedule should be laid before the Assembly during the same session at which the budget is presented and discussed . It may be pointed that rule 130 D of the Bombay Legislative Assembly Rules made under sub-section (1) of section 84 of the Government of India Act, 1935, which empowers the Governor to appoint a day for laying the Schedule of the auti rised expenditure of the Province before the Assembly does not prescribe that the date to be appointed by the Governor should be a date before the end of the session at which the budget is presented and discussed. Accordingly, it will be competent for the Governor to fix a date under this rule for the laying of the Schedule of the authorised supplementary expenditure for the year 1949-1950 on a d

P.T.O.

during the next assession of the Legislative Assembly.

Sd/-P.[illegible]Lad
O.C. 12/11

Remembrancer of Legal Affairs

L.R. to F.D., No. 12483, dated the 5th November 1949

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4 Cs.

Office of the R.L.A.

overnment of
ndia Act, 1935,
ection 241(2) t

The view taken by Deputy Secretary, Finance Department is correct. Under section 241(2)(b) of the Government of India Act, 1935, ~~1935~~ the Governor of the Province of persons authorised by the ~~fxxxxxxic~~ Governor can make rules relating to the conditions of service of persons serving in connection with the affairs of a Province. Rules can therefore be made under this provision regulating the calculation of the completed years of service of the Provincial Government Servants Special provisions can also be made in such rules prescribing a different mode of calculation of the completed years of service of a certain class of Government servants or of certain specified cadres in which case these special provisions would be construed as exceptions to the general rules.

Sd/- P.M.Lad

P.C. 22/12

Remembrancer of Legal Affairs.

J.R. to F.D. No. 14992, dated the 23rd December 1949.

Mjr/11/6/

4 Cs.

Office of the R.L.A.

M.L.As. and M.L.Cs. whether Government Servants.

Financial Rule 75-A.

The question raised for the R.L.A's consideration is whether the Members of the Provincial Legislative Assembly are Government servants, and if so, whether Financial Rule 75-A would be applicable to them .

2. Section 72 of the Government of India Act, 1935, provides that Members of the Provincial Legislative Assemblies and Legislative Councils shall be entitled to receive such salaries and allowances as may from time to time be determined by an Act of the Provincial Legislature. Section 3 of the Bombay Legislature Members' Salaries and Allowances Act, 1937, prescribes the salary, daily allowance, travelling allowance and conveyance allowances of members. The salary and allowances payale under this Act would not make the Members 'Government Servants' for such remuneration would not make their office one of profit under the Crown (See section 69 sub-section (1) clause (a) of the Government of India Act, 1935). Consequently the Members of the Provincial Legislatures cannot be considered Government servants at all and the financial Rule 75-A would not be applicable to them.

Sd/- P.M.Lad

Remembrancer of Legal Affairs.

Mjr/11/6/

4 Cs.

No. 13228

Office of the

Remembrancer of Legal Affairs,

Bombay Castle (Bombay No. 1)
21st November 1949.

To

The Accountant General, Bombay.

Subject:- Attachment of Salaries of members of the Bombay Legislative Assembly.

Sir,

With reference to your letter No. GV MLA, 6214, dated the 9th November 1949, on the above subject I have the honour to forward herewith a copy of the opinion recorded by the Remembrancer of Legal Affairs.

Yours faithfully,

Sd/- P.M.Lad

o.c. 18/4

Remembrancer of Legal Affairs.

Mjr/11/6

4 Cs.

Office of the R.L.A.

Question whether Parliamentary Secretaries can continue to be officials of committees and institutions.

Attention is invited to R.L.A's opinions No. 4616, dated 6th May 1947 and No . 2925, dated 22nd May 1948. Applying the Principles stated in these opinions, it appears, Mr. Babubhai J. Patel, M.L.A. Parliamentary Secretary to the H.P., will have to resign from membership or chairmanship of committees or institutions at serial Nos. 17,18,19, 20,21, 29 in the list at pages 15-17 ante. Presumably he is not entitled to any remuneration or honororium from the other committees or institutions of which he is a member or a chairman. Similarly Mr. B.D. Deshmukh, M.L.A. will have to resign from offices he is holding of committees or institutions at serial Nos. 1,2 and 20 in the list at pages 5-6 ante.

Sd/- P.M.Lad

A.C. 13/12

Remembrancer of Legal Affairs.

U.R. to P. and S.D., No. 14629 , dated the 14th December 1949.

Mjr/11/6

4 Cs.